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In the Supreme Court of the United States

OCTOBER TERM, 1992

DRILAKE FARMS, INC., ET AL., PETITIONERS

v.

JULIO SURRILLO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, employers who seek to hire temporary foreign workers must obtain certification from the Department of Labor that qualified United States workers are unavailable and that the employment of temporary foreign workers will not adversely affect the wages and working conditions of similarly employed United States workers. Before providing certification, the Department of Labor requires employers to attempt to recruit United States workers through the employment service system created by the Wagner-Peyser Act of 1933, 29 U.S.C. 49 *et seq.*

The question presented is whether a State must, pursuant to the Full Faith and Credit Clause, enforce the order of another state court exercising long-arm personal jurisdiction over an employer who hired domestic workers from the latter State through the Wagner-Peyser system.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. During the time period relevant to this case, regulations promulgated pursuant to the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, imposed restrictions on the ability of agricultural employers within the United States to hire temporary foreign

workers. Agricultural employers desiring to hire temporary foreign workers were required to obtain the Department of Labor's certification that qualified United States workers were unavailable and that the employment of temporary foreign workers would not adversely affect the wages and working conditions of similarly employed United States workers. 8 C.F.R. 214.2(h)(3) (1978).[1] Before providing such certification, the Department of Labor required employers to utilize the interstate employment referral system created pursuant to the Wagner-Peyser Act of 1933, 29 U.S.C. 49 *et seq.* (Wagner-Peyser system), in an attempt to recruit workers from within the United States to fill available job openings. See 20 C.F.R. 655.201(c) (1978). Employers could obtain permission to employ temporary foreign workers only if efforts to recruit United States workers through the Wagner-Peyser system failed. 20 C.F.R. 655.200(a), 655.206(a) (1978); see generally *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 594-596 (1982).

To initiate the process leading to the hiring of foreign workers, employers were required to submit an application for certification to employ temporary foreign workers to a local employment office at least 80 days before the employers' "date of need." 20 C.F.R. 655.200(a) (1978). The application had to include a job offer giving notice of the job opening and detailing the terms and conditions of employment, including the employer's promise that "[t]he job oppor-

[1] This regulatory requirement was essentially codified by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301(c), 100 Stat. 3411, as amended (presently codified at 8 U.S.C. 1188).

tunity is open to all qualified U.S. workers." 20 C.F.R. 655.201(b), 655.202, 655.203(c) (1978). The local employment office would then prepare a job clearance order and begin recruiting workers for the employer in the local labor market; in addition, the job clearance order would be circulated to other regions of the country through the Wagner-Peyser system in an attempt to fill the employer's needs. 20 C.F.R. 655.204(b), 655.205(a) (1978). Finally, twenty days in advance of the employer's "date of need," the Department of Labor would certify the number of workers located within the United States and the number of foreign workers, if any, that the employer would be permitted to employ. 20 C.F.R. 655.206(a) (1978).[2]

2. Petitioners are a West Virginia corporation and its officer who sought to hire temporary foreign workers to harvest their fall apple crop in 1978. Pet. App. 29a-30a. In keeping with the requirements of the Immigration and Nationality Act, petitioners submitted to their local employment office an application for certification to obtain foreign labor, together with the requisite job offer. Resp. App. 3a. The job offer, set forth on a Department of Labor "clearance order" form, identified a number of regions to which it would be circulated, including Region II (containing Puerto Rico). *Id.* at 11a, 13a.[3]

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[2] Essentially the same system remains in effect today under revised statutory and regulatory provisions. See generally 8 U.S.C. 1188; 20 C.F.R. 653.500 *et seq.*, 655.90 *et seq.* (1991).

[3] At the time petitioners submitted their job clearance order, Puerto Rican workers were considered "unavailable" for employment within the meaning of the Immigration and Nationality Act because of special conditions placed on their

Petitioners did not formally authorize either the Department of Labor or the Puerto Rico Department of Labor and Human Resources to act as their hiring agent. Petitioners did, however, sign the required assurance stating that they would cooperate with the Wagner-Peyser system in recruiting United States workers. Resp. App. 7a. At no time during the hiring process—even after being informed that Puerto Rican workers had been recruited—did petitioners terminate the process by withdrawing their certification application and rescinding their job offer. Pet. App. 49a-50a; Resp. App. 8a-9a.

The Puerto Rican government recruited workers for petitioners. Pet. App. 32a; Resp. App. 5a-6a. The Puerto Rico Department of Labor and Human Resources screened applicants and required workers to obtain the necessary documentation. It also arranged transportation from Puerto Rico to petitioners' job site. Pet. App. 32a.

By letter dated August 16, 1978, the Department of Labor advised petitioners that 19 Puerto Rican workers were available for employment and that it would certify that petitioners were therefore entitled

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employment by Puerto Rican law. Act of June 22, 1962, No. 87, 1962 P.R. Laws 228, amended by Act of July 21, 1977, No. 7, 1977 P.R. Laws 553; see generally *Hernandez Flecha* v. *Quiros*, 567 F.2d 1154 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978). Thereafter, while petitioners' clearance order was being circulated, the Puerto Rican legislature amended its laws to exempt workers under the Wagner-Peyser system from those special conditions. Act of July 13, 1978, No. 54, 1978 P.R. Laws 537. At Puerto Rico's request, petitioners' clearance order was then forwarded to the Puerto Rico Department of Labor and Human Resources. Pet. App. 31a-32a & n.2; Resp. App. 5a.

to hire eight temporary foreign workers. Pet. App. 32a-33a; Resp. App. 7a-8a. The letter also indicated that the names and locations of the 19 Puerto Rican workers would be made available at the Winchester office of the Virginia Employment Commission, the local employment office at which petitioners had submitted their job clearance order. Resp. App. 8a. In fact, however, that office furnished to petitioners the names and social security numbers of 13 workers, only two of whom presented themselves for employment. *Ibid.* Twenty-five other Puerto Rican workers, whose names had not been furnished to petitioners, simply arrived unannounced in Winchester on September 8, 1978, the date specified by petitioners. *Ibid*; Pet. App. 33a.

Petitioners hired all 27 of the Puerto Rican workers who arrived at the work site on September 8, including respondents.[4] After working a short time, respondents were fired. Pet. App. 33a, 50a.

3. Respondents filed three suits in Puerto Rico Superior Court, seeking damages for breach of contract. Although petitioners were notified of the suits, they did not appear, and respondents obtained default judgments against them. Pet. App. 33a; Resp. App. 2a-3a.[5] Respondents then sought to enforce the de-

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[4] Respondents are 14 of those workers, together with the parents of two additional workers who were minors at the time. Pet. iii-iv.

[5] The judgments stated that respondents had accepted petitioners' job offer, made in Puerto Rico, and that the resultant contract bound petitioners to provide respondents with a stated quantity of work, but that petitioners had breached that contract by firing respondents prematurely without legal cause or justification.

fault judgments in the West Virginia courts. Pet. App. 34a; Resp. App. 2a.

The West Virginia trial court granted summary judgment for petitioners. Pet. App. 1a-14a, 15a-22a. The court found that the mere transmittal of petitioners' job clearance order to Puerto Rico did not constitute "minimum contacts" sufficient to vest the Puerto Rico courts with *in personam* jurisdiction over petitioners, and that any contracts entered into between petitioners and respondents were formed in Virginia, not Puerto Rico. *Id.* at 4a-10a. Accordingly, the court concluded that the Puerto Rico default judgments were not entitled to full faith and credit.

4. The West Virginia Supreme Court of Appeals reversed. Pet. App. 23a-60a. The court explained that the dispositive question was whether petitioners had sufficient "minimum contacts" with Puerto Rico to establish personal jurisdiction. *Id.* at 37a (citing *Kulko* v. *Superior Court*, 436 U.S. 84 (1978); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)). In answering that question, the court noted, "'[o]ne essential inquiry'" was whether petitioners had purposefully acted to obtain benefits or privileges in the forum state. Pet. App. 38a (citing *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); *Hanson* v. *Denckla*, 357 U.S. 235 (1958)).

Applying those standards, the court found that petitioners "purposefully availed themselves of the Puerto Rican government's employment services in order to solicit workers at stated contract terms and that the solicitation resulted in Puerto Rican workers agreeing to the terms" offered by petitioners. Pet.

App. 48a. Not only did petitioners "deliberately set in motion the hiring procedures of the interstate clearance system," but they actually knew that workers were being recruited in Puerto Rico on their behalf and that "a number of Puerto Rican workers had been found to fill, at least in part, the jobs the [petitioners] had available." *Id.* at 49a-50a. In addition, the court relied on the fact that "[petitioners] did nothing to reject these workers or to discourage further recruiting" and "even provided them with work for several days before firing them." *Id.* at 50a. Under those circumstances, the court found, "it was reasonably foreseeable that the [petitioners] would be sued in Puerto Rico." *Ibid.*

DISCUSSION

In our view, the determination of whether an agricultural employer should be subject to out-of-state litigation based upon interstate recruitment activities under the auspices of the Wagner-Peyser system—like other questions of personal jurisdiction—necessarily depends upon the particular facts and circumstances of the case. In this case, the West Virginia Supreme Court of Appeals did not adopt an inflexible rule subjecting all agricultural employers using the Wagner-Peyser system to jurisdiction for any related claim in any State. Instead, the court determined that petitioner's own knowledge, acts, and omissions made it reasonable for the courts of Puerto Rico to assume jurisdiction over respondents' claims for breach of contract.

The West Virginia Supreme Court of Appeals' determination does not frustrate the federal interest in the effective operation of the Wagner-Peyser system.

It also does not conflict with any decisions of this Court or of any other court. To be sure, the correctness of the decision below is open to question, but in the final analysis that decision amounts to nothing more than a fact-bound application of settled law. We accordingly believe that further review is unnecessary.

1. a. The West Virginia Supreme Court of Appeals correctly articulated the established legal standards that govern this case. As the court recognized, the Full Faith and Credit Clause makes the valid judgments of the courts of one State enforceable in all other States. *Shaffer* v. *Heitner*, 433 U.S. 186, 210 (1977). A judgment rendered without *in personam* jurisdiction, however, violates due process, and is therefore "void in the rendering State and is not entitled to full faith and credit elsewhere." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291 (1980).

It is well settled that the Due Process Clause permits a state court to exercise personal jurisdiction over a non-resident defendant only if there exist "minimum contacts" between the defendant and the forum State "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). This Court has abandoned "more formalistic tests that focus[] on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of government, to require it to defend the suit in that State." *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1910 (1992).

Thus, "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there," due process is satisfied "if the defendant has 'purposefully directed' his activities at residents of the forum * * * and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472-473 (1985) (citations omitted); see *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 297; *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

In *Burger King*, 471 U.S. at 473, the Court applied these due process principles to a forum's assertion of jurisdiction over claims arising out of a contract between residents of different States. In that case, residents of Michigan entered into a contract with a Florida corporation, Burger King Corporation, authorizing the operation of a Burger King franchise in Michigan. When the franchisees failed to make payments due under the terms of the franchise, Burger King terminated the agreement, and instituted an action against the franchisees in federal court in Florida. On the facts presented, the Court held that the franchisees could reasonably be subjected to suit in Burger King's home State of Florida.

Although the Court stated that entering into a contract with an out-of-state party is not itself sufficient to create jurisdiction in the other party's forum State, 471 U.S. at 478, it reasoned that parties who "purposefully derive benefit" from their "interstate activities" can be held responsible for "consequences that arise proximately from such activities." *Id.* at 473. The Court emphasized that "the Due Process Clause may not readily be wielded as a territorial

shield to avoid interstate obligations that have been voluntarily assumed." *Id.* at 474. The Court concluded that it was not fortuitous to subject the defendant franchisee to suit in Florida, because the defendant "[e]schew[ed] the option of operating an independent local enterprise" and "deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise." *Id.* at 479-480.

b. The court below applied these accepted legal principles in finding that the Puerto Rico courts possessed *in personam* jurisdiction over the breach-of-contract action against petitioners. The court properly enunciated the governing standards set forth in this Court's decisions, and found that in the circumstances of this case the requirements of due process had been satisfied. The assertion of jurisdiction in Puerto Rico did not rest solely on the fact that petitioners entered into contracts with out-of-state residents. The court instead applied the principles established in *Burger King*, and relied upon petitioners' entire course of conduct in recruiting, hiring, and firing respondents to support the conclusion that it was reasonable to subject petitioners to jurisdiction in Puerto Rico.

The court expressly found that petitioners knowingly authorized the circulation of an offer of employment in Puerto Rico, and that they engaged in this "interstate activit[y]" in order to "purposefully derive [the] benefit," see *Burger King*, 471 U.S. at 473, of hiring out-of-state and foreign workers. Petitioners contend (Pet. 23-34), however, that the court below erred in relying on the actions of respondents and of third parties such as the Puerto Rico Department of Labor and Human Resources to support its

finding that petitioners had minimum contacts with Puerto Rico.

Contrary to petitioners' assertion, the court did not improperly "shift the focus" from petitioners' conduct to that of respondents or others. Pet. 24-25. Instead, the court found that petitioners "purposefully availed themselves of the Puerto Rican government's employment services in order to solicit workers at stated contract terms" and that petitioners had "knowledge that recruiting was taking place [in Puerto Rico] on their behalf." Pet. App. 48a-49a. Nonetheless, petitioners "did nothing to reject these [Puerto Rican] workers or to discourage further recruiting," and "even provided [the workers] with work for several days before firing them." *Id.* at 50a.

It is apparent from these findings that the court properly looked to the conduct of petitioners themselves in determining whether the requirements of the Due Process Clause had been satisfied. See, *e.g.*, *Burger King*, 471 U.S. at 474-476. Moreover, after analyzing the facts set forth above, the court concluded that "it was reasonably foreseeable that [petitioners] would be sued in Puerto Rico," Pet. App. 50a—precisely the standard that petitioners claim the court *should* have applied. Pet. 27; see *Burger King*, 471 U.S. at 474 (" '[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' "). Although one may quarrel with the court's ultimate conclusion in this regard, that conclusion at most represents an erroneous application of settled principles to the specific facts of this case.

2. We also do not share petitioners' view that certiorari is warranted because the decision of the West Virginia Supreme Court of Appeals conflicts with the federal scheme established by the Wagner-Peyser Act or with the decisions of other courts.

a. Petitioners express concern (Pet. 34-38) that the decision below will inflict a "crippling blow" on the Wagner-Peyser system by discouraging employers from participating in that system for fear of subjecting themselves to suit in "the state courts of *every state* to which the job order is sent." Pet. 35. This overstates the effect of the court's holding. The court expressly relied on the fact that respondents were actually recruited and hired as a result of the circulation of petitioners' job clearance order in Puerto Rico; nothing in the court's opinion forecloses a different result in a case where those factors are not present.

In any event, regulations promulgated by the Department of Labor in 1987 have expanded the administrative relief available to workers dissatisfied with the conduct of participating employers under the Wagner-Peyser system, thus increasing the likelihood that such disputes will be resolved administratively rather than through litigation. See 29 C.F.R. Pt. 501. Accordingly, the issue of personal jurisdiction in suits arising out of employment relationships created through the Wagner-Peyser system is less likely to arise in the future, and employers are unlikely to be deterred by the speculative threat of burdensome litigation resulting from unresolved administrative claims.

b. We also disagree with petitioners' contention (Pet. 38-42) that the decision below is in direct conflict with the decisions of other courts. Every court

presented with the question at issue in this case has concluded that personal jurisdiction exists in forum States over employers who hire plaintiffs from those States through the Wagner-Peyser system. See Pet. App. 23a-60a; *Rios* v. *Altamont Farms, Inc.*, 64 N.Y. 2d 792, 476 N.E.2d 312, 486 N.Y.S.2d 913, cert. denied, 473 U.S. 905 (1985); *Neizil* v. *Williams*, 543 F. Supp. 899 (M.D. Fla. 1982); *Garcia* v. *Vasquez*, 524 F. Supp. 40 (S.D. Tex. 1981).

Petitioners assert that those decisions are inconsistent with *Chery* v. *Bowman*, 901 F.2d 1053 (11th Cir. 1990), but that case is not on point. In *Chery*, an individual learned of the defendant's employment offer while in Virginia and was hired by the defendant in that State. That individual, acting on his own behalf, then recruited other workers from Florida who traveled to Virginia and were also hired by the defendant. After being discharged, those workers brought suit against the defendant in Florida, asserting as the basis for personal jurisdiction the fact that Wagner-Peyser job clearance orders submitted by the defendant had been circulated in Florida.

Noting that the defendant "had no contact with the state of Florida" other than the mere submission of the job clearance orders, and that "any contact created by [the] clearance orders was fortuitous, particularly since [defendant] hired none of the plaintiffs as a result of the clearance orders being sent to Florida," the court concluded that personal jurisdiction was absent in Florida. 901 F.2d at 1056. The court distinguished *Rios* v. *Altamont Farms, Inc.*, *supra*, explaining that "[i]n *Rios*, unlike this case, the defendant apple growers received substantial benefits from the forum state's (Puerto Rico's) labor department in recruiting and processing the laborers who

ultimately became the plaintiffs." 901 F.2d at 1057.

Like *Rios*, the decision below is easily distinguishable from *Chery*. Petitioners' contacts with Puerto Rico were not limited to the mere submission of a clearance order that happened to circulate in Puerto Rico. Instead, the Puerto Rican government took action in response to petitioners' clearance order by recruiting employees for petitioners, and petitioners actually hired those employees after they had traveled from Puerto Rico to Virginia in reliance on petitioners' job offer. Petitioners derived "substantial benefits" from their utilization of the Wagner-Peyser system to recruit employees in Puerto Rico, see 901 F.2d at 1057, and thus *Chery* is inapposite.

To be sure, the Eleventh Circuit's opinion in *Chery* is in some tension with the decision below, because it asserts that "the Department of Labor's act of sending the clearance orders into a state does not constitute contact with that state by the agricultural employer." 901 F.2d at 1056-1057. Moreover, before explaining that the *Rios* decision—which is essentially identical to the decision below—was distinguishable on its facts, the *Chery* court observed that "we are not persuaded by" the reasoning of *Rios*. *Id.* at 1056.

Nonetheless, we do not believe that the tension between *Chery* and the other decisions in this area requires the Court's attention. The result in *Chery* is entirely consistent with the results in those other cases, all of which involved claims by individuals who had actually been hired pursuant to job clearance orders circulated in the forum State. As the *Chery* court itself recognized, 901 F.2d at 1057, that distinction has considerable significance for purposes of personal jurisdiction; an employer who has received

benefits from the efforts of the forum State to recruit employees, and who has in fact hired the employees so recruited, obviously has more significant contacts with, and more reason to expect to be sued in, the forum State than does an employer in the situation of the *Chery* defendant. Thus, *Chery* can easily be reconciled with the decision below and with the other cases to the same effect, and review is therefore unnecessary.

Petitioners' reliance (Pet. 41) on *Lopez-Rivas* v. *Donovan*, 629 F. Supp. 564 (D.P.R. 1986), is likewise misplaced. The *Lopez-Rivas* court did not address the issue of personal jurisdiction, choosing instead to decide the case on the ground that subject matter jurisdiction was lacking. See 629 F. Supp. at 567 ("Regardless of the validity of defendants' * * * personal jurisdiction * * * arguments, the court considers the challenge to our subject matter jurisdiction as fundamental and dispositive of plaintiffs' claims."). The issue decided in *Lopez-Rivas* was whether the placement of a job clearance order in the Wagner-Peyser system established an obligation on the part of the employer to hire all workers who accepted such employment offers. Clearly, that determination has no bearing on the question of personal jurisdiction at issue here. Indeed, the *Lopez-Rivas* court recognized as much; the court observed that the circumstances before it were "quite distant from" the "entirely different factual and legal scenario" of those workers "who were in fact hired for the 1978 apple harvest and who did in fact go to the farms in the continental United States." 629 F. Supp. at 569.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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